

1  
2  
3  
4 MONICA CANILAO, et al.,  
5 Plaintiffs,  
6 v.  
7 CITY COMMERCIAL INVESTMENTS,  
8 LLC,  
9 Defendant.

10 Case No. [20-cv-08030-EMC](#)  
11  
12

**ORDER GRANTING DEFENDANT'S  
MOTION FOR JUDGMENT ON THE  
PLEADINGS**

Docket No. 51

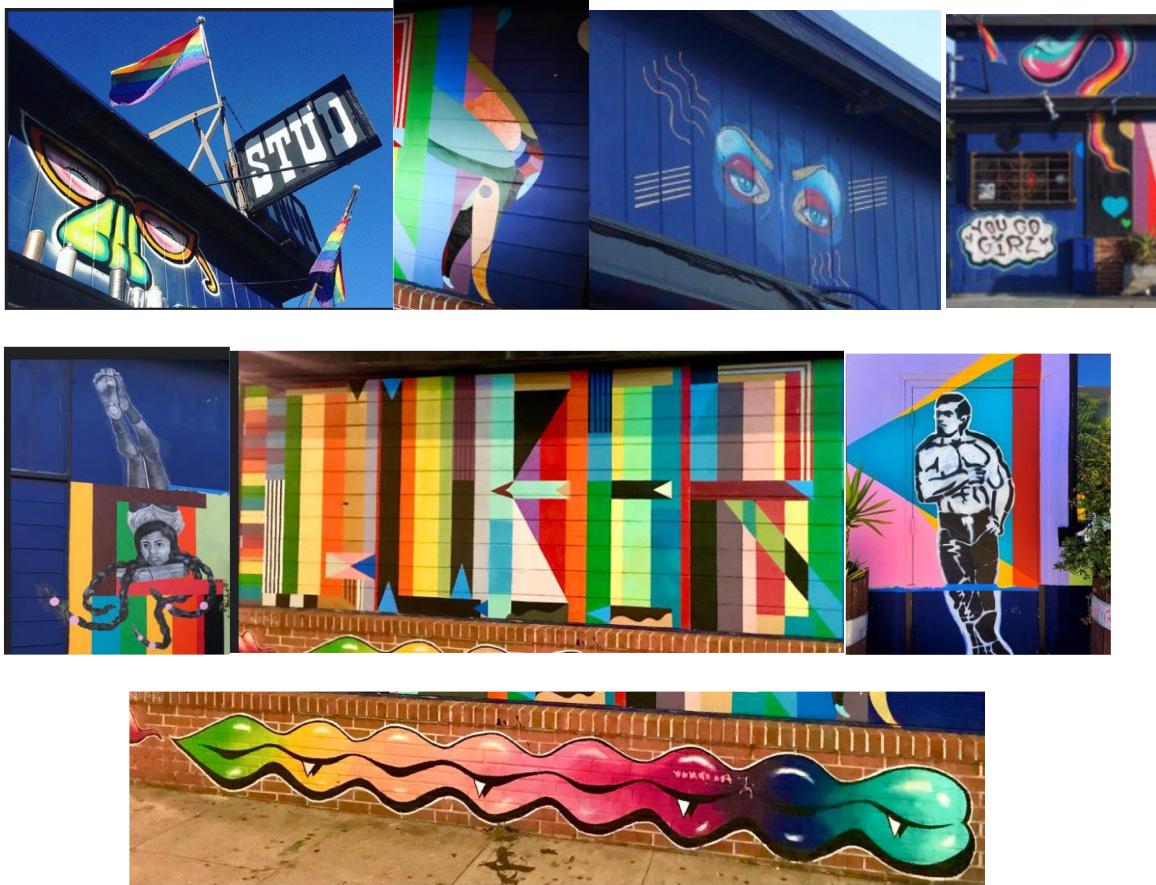
13  
14 Plaintiffs are six artists who painted murals on the exterior walls of the Stud Bar, San  
15 Francisco's oldest continuously operating queer bar until it shut down in May 2020. Plaintiffs  
16 bring this action against Defendant City Commercial Investments, LLC ("CCI"), the owner of the  
17 building in which Stud operated, to challenge CCI's alleged whitewashing and intentional  
18 destruction of Plaintiffs' murals without notice in June 2020. Plaintiffs raise claims under the  
19 federal Visual Artists Rights Act, California Arts Preservation Act and for negligence.

20 Now pending is CCI's motion to dismiss Plaintiffs' claims for lack of subject matter  
21 jurisdiction and for judgment on the pleadings. Docket No. 51. For the following reasons, the  
22 Court **GRANTS** CCI's motion.

23                   **I.        BACKGROUND**

24 A.        Relevant Factual Allegations

25 In 2017, Plaintiffs Monica Canilao, Zarathustra Wesolowski, Ellery Bakaitis, Jeremy  
26 Novy, Susan Greene, and Hailey Gaiser (collectively, "Plaintiffs") each painted large scale murals  
27 on the exterior of San Francisco's oldest continuously operating queer bar, The Stud. Docket No.  
28 1 ("Compl.") ¶ 15. Images of some of the murals follow:

United States District Court  
Northern District of California

*Id.* (images of works including “*Hands Lips, Face and Teeth,*” “*Queer Trans Spaces,*” “*Stud Stencil no. 1,*” “*Stepping Out,*” “*Eyes Wide Open,*” and “*Head First*”). The Stud was located in a building at 399 9th Street in San Francisco (the “Building”), owned by Defendant City Commercial Investments, LLC (“CCI”), and the bar was operated by Handsome Heidi, LLC, (“Handsome Heidi”). *Id.* ¶ 15; Docket No. 31 (“Am. Third Party Compl.”) ¶ 6. Plaintiffs allege

[t]he process of creating the Murals became a community celebration as many generations of queers, elders and youth, from all walks of life, came out to visit and cheer the Artists on. Over the following years the Murals being located at the off ramp of the I-80’s 9<sup>th</sup> street exit was a highlight for all people to see and the Murals became a symbol of the LGBTQ community’s fight to stay in San Francisco. Passersby and bar patrons would pose and take pictures with friends, memorials were centered there and celebrations were held daily, all in front of the Murals that were proclaiming a message of queer safety and solidarity. The community venerated the Murals and saw them as an important symbol of refuge.

*Id.* ¶ 16. However, the Stud suffered debilitating losses as a result of the COVID-19 pandemic

1 and related “stay-at-home” orders issued, and, on or about May 31, 2020, the Stud closed its doors  
2 after 54 years in business. *Id.* ¶ 17. After announcing the bar’s closing, the operators of the Stud,  
3 Handsome Heidi, allegedly requested information from Defendant CCI about its plans for the  
4 building, “specifically noting that if the building was to be demolished that community members  
5 were interested in the façade being saved, preserved and moved; or that pieces of the building  
6 could be distributed.” *Id.* ¶ 18.

7 The Stud “moved out on the eve of June, which is LGBTQ pride month, and most  
8 importantly to all San Franciscans, the 50-year anniversary of the city’s historic Pride Week  
9 celebration, where millions of people and the world’s eyes land on the SF LGBTQ community to  
10 continue to lead the way in a worldwide struggle for human rights.” *Id.* ¶ 19. On June 20, 2020,  
11 Plaintiff allege that CCI began to paint the building white, and then beige. *Id.* ¶ 20. Plaintiffs  
12 allege that the “moment [CCI] began whitewashing and erasing the Artists’ Murals, people on the  
13 street asked them to stop, but they refused.” *Id.* As news about the “destruction” of the murals  
14 spread, Plaintiff there was an “outpouring of emotions and stories throughout the community” as  
15 reflected in coverage by a number of news media outlets, including “Kron 4 News, SFGATE,  
16 [and] the SF Chronicle.” *Id.* ¶ 21. Plaintiffs allege that CCI completed its destruction of the  
17 murals by “mid-week of Pride 2020,” and that CCI’s decision, without warning or notice, to  
18 willfully destroy the murals during a historic event for San Francisco’s LGBTQ community  
19 “demonstrated clear disdain for and degradation of [Plaintiffs]” and caused sadness, harm and  
20 outrage to Plaintiffs and the community. *Id.* ¶¶ 22-23.

21 Plaintiffs allege Defendant’s intentional destruction of their murals violates the Visual  
22 Artists Rights Act (“VARA”), 17 U.S.C. § 106A, Compl. ¶¶ 24-29, the California Arts  
23 Preservation Act, Cal. Civ. Code § 987, Compl. ¶¶ 30-35, and constitutes negligence, *id.* ¶¶ 36-40.  
24 Plaintiff seek damages, including statutory damages and punitive damages, and an order  
25 permanently enjoining CCI from destroying their artworks. Compl. § Prayer.

26 **B. Procedural Background**

27 Plaintiffs filed this action on November 13, 2020 against Defendant City Commercial  
28 Investments, LLC (“CCI”). *See* Compl. On March 16, 2021, CCI filed a third-party complaint

1 against Handsome Heidi, Docket No. 20, and on July 29, 2021, CCI filed an amended third-party  
2 complaint against Handsome Heidi, alleging that Handsome Heidi invited the Plaintiffs to the  
3 leased premises for the purpose of painting artwork onto the exterior of the building, asserting  
4 claims for breach of contract, contractual indemnity, waste, and negligence. *See Am. Third Party*  
5 *Compl.*

6 Now pending is CCI's motion to dismiss Plaintiffs' complaint pursuant to Fed. R. Civ. P.  
7 12(b)(1) for lack of subject matter jurisdiction and for judgment on the pleadings pursuant to Fed.  
8 R. Civ. P. 12(c). *See Docket No. 51 ("Mot."*). The Court heard argument on the motion on May  
9 12, 2022, and provided the parties with the opportunity to submit supplemental briefing on the  
10 principles that should guide the Court's interpretation of the VARA by May 19. The parties  
11 timely filed supplemental briefs. *See Docket Nos. 64, 65.*

## 12                   **II. STANDARD OF REVIEW**

### 13                   A. Lack of Subject Matter Jurisdiction/Standing (Rule 12(b)(1))

14 Under Rule 12(b)(1), a party may move to dismiss for lack of subject matter jurisdiction.  
15 “[L]ack of Article III standing requires dismissal for lack of subject matter jurisdiction under  
16 [Rule] 12(b)(1).” *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). The “irreducible  
17 constitutional minimum” of standing requires that a “plaintiff must have (1) suffered an injury in  
18 fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to  
19 be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins (“Spokeo II”)*, 136 S. Ct.  
20 1540, 1547 (2016). These three elements are referred to as, respectively, injury-in-fact, causation,  
21 and redressability. *Planned Parenthood of Greater Was. & N. Idaho v. U.S. Dep’t of Health &*  
22 *Human Servs.*, 946 F.3d 1100, 1108 (9th Cir. 2020). “The plaintiff, as the party invoking federal  
23 jurisdiction, bears the burden of establishing these elements,” which at the pleadings stage means  
24 “clearly . . . alleg[ing] facts demonstrating each element.” *Spokeo II*, 136 S. Ct. at 1547 (quoting  
25 *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

26 A Rule 12(b)(1) jurisdictional attack may be factual or facial. *See Safe Air for Everyone v.*  
27 *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). “In a facial attack,” “the challenger asserts that the  
28 allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction.”

1     *Id.* The court “resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6):  
2     Accepting the plaintiff’s allegations as true and drawing all reasonable inferences in the plaintiff’s  
3     favor, the court determines whether the allegations are sufficient as a legal matter to invoke the  
4     court’s jurisdiction.” *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

5              “[I]n a factual attack, the challenger disputes the truth of the allegations that, by  
6     themselves, would otherwise invoke federal jurisdiction.” *Safe Air for Everyone*, 373 F.3d at  
7     1038. In resolving such an attack, unlike with a motion to dismiss under Rule 12(b)(6), the Court  
8     “may review evidence beyond the complaint without converting the motion to dismiss into a  
9     motion for summary judgment.” *Id.* Moreover, the court “need not presume the truthfulness of  
10    the plaintiff’s allegations.” *Id.* at 1039. “Once the moving party has converted the motion to  
11    dismiss into a factual motion by presenting affidavits or other evidence properly brought before  
12    the court, the party opposing the motion must furnish affidavits or other evidence necessary to  
13    satisfy its burden of establishing subject matter jurisdiction.” *Id.* (citation omitted).

14              Either way, “it is within the trial court’s power to allow or to require the plaintiff to supply,  
15     by amendment to the complaint or by affidavits, further particularized allegations of fact deemed  
16     supportive of plaintiff’s standing.” *Warth*, 422 U.S. at 501; *see also Table Bluff Reservation*  
17     (*Wiyot Tribe v. Philip Morris, Inc.*, 256 F.3d 879, 882 (9th Cir. 2001) (in assessing standing, the  
18     court may consider “the complaint and any other particularized allegations of fact in affidavits or  
19     in amendments to the complaint”)).

20     B.     Fed. R. Civ. P. 12(c): Judgment on the Pleadings

21              Pursuant to Fed. R. Civ. P. 12(c), “a party may move for judgment on the pleadings” after  
22     the pleadings are closed “but early enough not to delay trial.” A Rule 12(c) motion is  
23     “functionally identical” to a Rule 12(b)(6) motion to dismiss for failure to state a claim, and  
24     therefore the same legal standard applies. *Cafasso v. General Dynamics C4 Sys., Inc.*, 637 F.3d  
25     1047, 1055 n.4 (9th Cir. 2011).

26              Federal Rule of Civil Procedure 8(a)(2) requires a “pleading that states a claim for relief”  
27     to include “a short and plain statement of the claim showing that the pleader is entitled to relief.”  
28     Fed. R. Civ. P. 8(a)(2). A pleading that fails to meet this standard may be dismissed pursuant to

1 Rule 12(b)(6). *See* Fed. R. Civ. P. 12(b)(6). To overcome a Rule 12(b)(6) motion to dismiss after  
2 the Supreme Court’s decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic*  
3 *Corporation v. Twombly*, 550 U.S. 544 (2007), a plaintiff’s “factual allegations [in the pleading]  
4 ‘must . . . suggest that the claim has at least a plausible chance of success.’” *Levitt v. Yelp! Inc.*,  
5 765 F.3d 1123, 1135 (9th Cir. 2014). The court “accept[s] factual allegations in the [pleading] as  
6 true and construe[s] the pleadings in the light most favorable to the nonmoving party.” *Manzarek*  
7 *v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). But “allegations in a  
8 [pleading] . . . may not simply recite the elements of a cause of action [and] must contain  
9 sufficient allegations of underlying facts to give fair notice and to enable the opposing party to  
10 defend itself effectively.” *Levitt*, 765 F.3d at 1135 (quoting *Eclectic Props. E., LLC v. Marcus &*  
11 *Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014)). “A claim has facial plausibility when the  
12 Plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
13 Defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “The plausibility  
14 standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that  
15 a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556).

### 16 III. DISCUSSION

#### 17 A. VARA Claim

18 CCI advances three arguments that Plaintiffs have failed to plead all of the statutory  
19 elements for a claim under the Visual Artists Rights Act and, therefore, either lack standing to  
20 assert a claim or have failed to state a claim.

##### 21 1. VARA’s Framework

22 The VARA was enacted in 1990 as an amendment to the Copyright Act. 17 U.S.C. §  
23 106A. “The purpose of VARA is to protect two ‘moral rights’ of artists—the rights of ‘integrity’  
24 and ‘attribution.’” *Cort v. St. Paul Fire & Marine Ins. Cos.*, 311 F.3d 979, 984–85 (9th Cir.  
25 2002) (citing H.R. Rep. No. 514, 101st Cong., 2nd Sess. 5 (1990)). “The right of integrity allows  
26 the [artist] to prevent any deforming or mutilating changes to his work, even after the title in the  
27 work has been transferred.” *Id.* at 985 (citation omitted and internal quotation marks omitted)  
28 (alteration in original). “The right of attribution allows the artist to be recognized by name as the

1 creator of a work.” *Id.* In order to provide those protections, the VARA states that “the author of  
2 a work of visual art” shall “have the right,” among other things, to “prevent any intentional  
3 distortion, mutilation, or other modification of [a] work which would be prejudicial to his or her  
4 honor” and “to prevent any destruction of a work of recognized stature, and any intentional or  
5 grossly negligent destruction of that work. . . .” 17 U.S.C. § 106A(a). “The rights cannot be  
6 transferred, but may be waived by a writing signed by the author.” *Carter v. Helmsley-Spear, Inc.*,  
7 71 F.3d 77, 83 (2d Cir. 1995). “Copyright registration is not required to bring an action for  
8 infringement of the rights granted under VARA, or to secure statutory damages and attorney's  
9 fees.” *Id.*

10 Additionally, the statute contains specific provisions governing artwork incorporated into a  
11 building, as relevant here. *See* 17 U.S.C. § 113(d).

12 (d)(1) In a case in which—

13 (A) **a work of visual art has been incorporated in or made**  
14 **part of a building in such a way that removing the work**  
15 **from the building will cause the destruction,** distortion,  
mutilation, or other modification of the work as described in  
section 106A(a)(3), **and**

16 (B) **the author consented to the installation of the work** in the  
17 building either before the effective date set forth in section  
610(a) of the Visual Artists Rights Act of 1990, or **in a written**  
18 **instrument** executed on or after such effective date that is  
signed by the owner of the building and the author and **that**  
19 **specifies that installation of the work may subject the work**  
**to destruction,** distortion, mutilation, or other modification, **by**  
20 **reason of its removal,**

21 then the rights conferred by paragraphs (2) and (3) of section  
22 106A(a) shall not apply.

23 (d)(2) **If the owner of a building wishes to remove a work of**  
24 **visual art which is a part of such building and which can be**  
**removed from the building without the destruction,** distortion,  
mutilation, or other modification of the work as described in section  
25 106A(a)(3), **the author's rights under paragraphs (2) and (3) of**  
**section 106A(a) shall apply unless—**

26 (A) **the owner has made a diligent, good faith attempt**  
27 **without success to notify the author** of the owner's intended  
action affecting the work of visual art, or

28 (B) **the owner did provide such notice in writing and the**  
**person so notified failed, within 90 days after receiving such**

**notice**, either to remove the work or to pay for its removal.

For purposes of subparagraph (A), an owner shall be presumed to have made a diligent, good faith attempt to send notice if the owner sent such notice by registered mail to the author at the most recent address of the author that was recorded with the Register of Copyrights pursuant to paragraph (3). If the work is removed at the expense of the author, title to that copy of the work shall be deemed to be in the author.

*Id.* (emphasis added).

To summarize, if the artwork is incorporated “**in such a way that removing the work from the building will cause the destruction**, distortion, mutilation, or other modification of the work,” then the artist’s rights may be waived if the artist “consented to the installation of the work in the building. . . in a written instrument.” *Id.* § 113(d)(1) (emphasis added).

Alternatively, “[i]f the owner of a building wishes to remove a work of visual art which is a part of such building and which can be removed from the building without the destruction, distortion, mutilation, or other modification of the work,” then the artist’s rights prevail unless one of two things has occurred. *Id.* § 113(d)(2) (emphasis added). First, the building’s owner “has made a diligent, good faith attempt without success to notify the author of the owner’s intended action affecting the work of visual art.” *Id.* Or second, the owner has “provide[d] such notice in writing and the person so notified failed, within 90 days after receiving such notice, either to remove the work or to pay for its removal.” *Id.*

Damages for violations of the VARA's rights of attribution and integrity are governed by general copyright law and include both actual and statutory damages. Statutory damages may range from \$750 to \$30,000 per work "as the court considers just." *Id.* § 504(c)(1). However, if "the [artist] sustains the burden of proving, and the court finds, that [a violation of the VARA] was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000 [per work]." *Id.* § 504(c)(2).

## 2. Consent of Building Owner

CCI argues that Plaintiffs lack standing to bring a claim under the VARA because they have failed to allege that they were authorized by the building owner—CCI—to paint murals on the building, and, thus, painting of the murals in the first instance was illegal and is not protected by

1 the VARA. Mot. at 12-13; *id.* at 13 (“Since Plaintiffs did not have permission from the owner of  
2 the subject property, Plaintiffs do not have rights under the VARA. Accordingly, this action  
3 should be dismissed in its entirety as this Court does not have jurisdiction and Plaintiffs do not  
4 have statutory standing.”). CCI concedes that the statutory provisions of the VARA “do[] not  
5 expressly state that the consent of the building owner is necessary.” *Id.* Instead, CCI argues that  
6 “common sense” implies a requirement that a plaintiff must plead consent of a building owner to  
7 establish standing and access the protections of the VARA. *Id.* The Court agrees with CCI, at  
8 least with regards to works of art that *cannot* be removed from a building without causing their  
9 destruction.

10 To ascertain whether building owner consent is required in order for VARA protections to  
11 attach to non-removable works of art affixed to buildings, the inquiry begins with the statutory  
12 language. CCI cites 17 U.S.C. § 113(d)(1) which explains that if the artwork is incorporated “in  
13 such a way that removing the work from the building will cause the destruction, distortion,  
14 mutilation, or other modification of the work,” then the artist’s rights may be waived if the artist  
15 “consented to the installation of the work in the building … in a written instrument” which is  
16 “signed by the owner of the building and the author” and “specifies that the installation of the  
17 work may subject the work to destruction, distortion, mutilation, or other modification, by reason  
18 of its removal.” *Id.* CCI concedes that there was no signed instrument in which Plaintiffs waived  
19 their VARA rights, as contemplated by the statute. Mot. at 15.

20 Instead, CCI contends that this provision implies that to state a VARA claim, an artist must  
21 allege they obtained the consent of a building owner to install the artwork in the first place.  
22 Otherwise, a building owner would never have had the opportunity to ask the artist to waive their  
23 rights in a signed instrument in the first instance and the provision would have no effect. Mot. at  
24 14. This reading is required, CCI argues, because the signed writing requirement of § 113(d)(1) is  
25 predicated on the assumption that an artist must be granted permission to install an artwork on a  
26 defendant’s building. Without this predicate, the VARA would create an incentive for an artist to  
27 secretly install unsanctioned, non-removable artwork without the permission of a building  
28 owner—likely in violation of trespass and vandalism laws—in order to make it impossible for a

1 building owner to negotiate a VARA waiver with the artist and to preclude the building own from  
2 removing the work (at least for the duration of the artist's life). Mot. at 14.; *see also id.* ("If the  
3 artist who did not obtain consent did somehow still acquire rights under VARA, it would mean  
4 that an unpermitted artist would have greater than a permitted artist who played by the rules.").

5 The Court finds CCI's argument persuasive, at least with regards to works of arts which  
6 cannot be removed from a building. It appears that just one district court has analyzed this  
7 question head on, and the court there adopted a view largely in line with CCI's argument. *See*  
8 *English v. BFC&R E. 11th St. LLC*, No. 97 Civ. 7446(HB), 1997 WL 746444, \*4-5 (S.D.N.Y.  
9 Dec. 3, 1997). In *English*, the court considered the defendants' argument that the VARA did not  
10 apply to non-removable works of art which were installed on their building without their  
11 permission. The court "f[ou]nd this argument convincing and h[e]ld that VARA is inapplicable to  
12 artwork that is illegally placed on the property of others, without their consent, when such artwork  
13 cannot be removed from the site in question." *Id.* at \*4. The court explained:

14 Defendants rely on common sense and on *Botello v. Shell Oil Co.*,  
15 229 Cal.App.3d 1130 (Ct. App. 1991), in which the California  
16 appellate court noted in passing that that state's moral rights statute  
17 applied only to "art that is affixed or attached by arrangement with  
18 the owner. It obviously does not apply to graffiti, which lacks these  
19 characteristics. . . ." This is a compelling argument, for otherwise  
parties could effectively freeze development of vacant lots by  
placing artwork there without permission. Such a construction of  
the statute would be constitutionally troubling, would defy  
rationality and cannot be what Congress intended in passing VARA.

20 *Id.* The court then reviewed the evidence in the summary judgment record to conclude that there  
21 was no genuine dispute that the sculptures in questions were not removable and were installed on  
22 the defendants' property without permission. *Id.* Accordingly, "[b]ecause plaintiffs have failed to  
23 raise a genuine dispute of fact as to any license or permission to place the [nonremovable] artwork  
24 on the property, and in light of the court's holding that VARA is inapplicable to such illegally  
25 placed works, summary judgment is appropriate." *Id.* at \*5. The court, however, noted that it  
26 "expresses no view on VARA's application to the individual sculptures, also illegally placed but  
27 not permanently affixed to the site[.]" *Id.*

28 The Court finds compelling the reasoning and conclusion in *English* that 17 U.S.C. §

1       113(d)(1) implies that an artist must have obtained permission from the building owner in order  
2       for VARA’s protections to attach to their installation of a non-removable artwork on a building.  
3       Reading § 113(d)(1) *without* a permission requirement would allow an artist to gain domination  
4       over a building by affixing a nonremovable, permanent work of art without the consent or  
5       knowledge of the owner. This could leave the building owner with a dilemma if it needed to  
6       maintain their building (such as to apply a protective coat of paint to preserve integrity of the wall,  
7       or perform rehabilitation affecting exterior walls necessary for safety or code compliance) or alter  
8       or deconstruct the building because of *e.g.* obsolescence. Absent consent of the author who  
9       installed the art without prior knowledge or consent of the owner, the building owner could be  
10      barred from doing the necessary work, at least for the life of the artist.

11           *English* cites to a California Court of Appeals decision, *Botello*, which examined  
12      California’s Art Preservation Act (“CAPA”), a moral rights statute which preceded the enactment  
13      of the VARA by 10 years. *See* Cal. Civ. Code § 987(j) (operative date was January 1, 1980). The  
14      relevant language of CAPA regarding the protection of non-removable artworks makes clear that a  
15      written instrument signed by the building owner is required to activate an artist’s moral rights to  
16      such non-removable artworks. *See* Cal. Civ. Code § 987(h)(1) (If a work of fine art cannot be  
17      removed from a building . . . , the rights and duties created under this section, *unless* expressly  
18      reserved by an instrument in writing signed by the owner of the building, . . . shall be deemed  
19      waived.). The phrasing of California’s statute expressly ensures that a building owner is not  
20      saddled with a binding obligation restricting their right to use, maintain or modify their own  
21      property by a party they may not even know, without their agreement or knowledge. As the court  
22      in *Botello* remarked, the fact that the statute places “no duty at all” on the building owner “if the  
23      mural cannot be detached from the structure,” “unless the artists’ rights have been preserved in an  
24      executed and recorded instrument,” avoids constitutional concerns that would inhere in a contrary  
25      rule that would allow artists to claim dominion to private property without the consent of the  
26      building owner. *Botello v. Shell Oil Co.*, 229 Cal. App. 3d 1130, 1138 (Ct. App. 1991).

27           While the statutory language of VARA does not, like CAPA, expressly premise the artist’s  
28      rights on knowledge and consent of the building owner, can be read as an implicit assumption of

1 such. Such an implication does not conflict with the language of VARA and makes practical and  
2 constitutional sense.

3 No case holds to the contrary. The best case for Plaintiffs is *Pollara v. Seymour*, in which  
4 the district court considered Defendants' argument that the "VARA does not protect works that are  
5 illegally placed on the property of others without their consent." 150 F. Supp. 2d 393, 396 n.4  
6 (N.D.N.Y. 2001). The court explained that "*English* is limited to the situation where the artwork  
7 cannot be removed without destroying it" which differed from the case at issue where there was no  
8 dispute that the work of art was removable. *Id.* Although the court distinguished the issue at bar  
9 from the one in *English*, the court dropped a footnote to observe that "there is no basis in the  
10 statute to find a general right to destroy works of art that are on property without the permission of  
11 the owner." *Id.* While *Pollara* took issue with *English*, it did not actually engage with *English's*  
12 reasoning. In any event, *Pollara* only addressed removable art.

13 Plaintiffs argue that the court in *English* was concerned with the hypothetical scenario that  
14 the VARA could be used misused strategically and nefariously by parties whose intent is not to  
15 create and display art, but to block development by placing artwork on a building without  
16 permission as a means of disruption. But this concern, Plaintiffs contend, would be dealt with by  
17 VARA's statutory text which states that the right to prevent "destruction of a work" applies only  
18 to "a work of recognized stature." 17 U.S.C. § 106A(a)(3)(B). Plaintiffs argue the scrawls of  
19 "taggers, trespassers and property-rights scofflaws," Mot. at 15, would be unlikely to constitute a  
20 "work of recognized stature" to trigger VARA protection as Defendant CCI and the *English* court  
21 worried. But what constitutes a "work of recognized structure" is ambiguous and may cut a wide  
22 swath. Courts have recognized street art may be considered "high art," and, thus, could rise to the  
23 level of "recognized stature." *Castillo v. G&M Realty L.P.*, 950 F.3d 155, 167-68 (2d Cir. 2020);  
24 *see also Cohen v. G&M Realty L.P.*, 988 F. Supp. 2d 212, 219 (E.D.N.Y. 2013) (trial court  
25 decision in the same litigation confirming that the artists obtained permission from the building  
26 owner to install aerosol works on the building). The requisite of "work of recognized structure"  
27 provides little protection and guidance to unknowing building owners.

28 In light of the foregoing, the Court concludes that § 113(d)(1) of VARA implies a

1 requirement that an artist obtain the consent of a building owner for VARA’s protections to apply  
2 to a nonremovable artwork installed on a building. As discussed above, there is a strong logical  
3 basis to read in this implied requirement into the statute, and such a requirement is not inconsistent  
4 with the text of the statute.

5 Plaintiffs concede that the complaint does not allege that Plaintiffs obtained permission  
6 from the *building owner*, Defendant CCI, prior to installing their nonremovable artworks. Instead,  
7 Plaintiffs argue that they have sufficiently alleged that they had permission from the owners of the  
8 Stud Bar—Handsome Heidi—to install the murals and that CCI’s third-party complaint against  
9 Handsome Heidi supports the inference that Handsome Heidi consented to Plaintiffs’ installation  
10 of the murals. *See Compl. ¶¶ 15, 16* (“The process of creating the Murals became a community  
11 celebration as many generations of queers, elders, and youth, from all walks of life came out to  
12 visit and cheer the Artists on.”), 18; Docket No. 31 ¶¶ 7, 16 (CCI’s pleading that Handsome Heidi  
13 invited Plaintiffs to the leased premises for the purposes of painting artworks on the building).  
14 Plaintiffs filed a supplemental brief arguing that if a property owner’s consent is a VARA  
15 prerequisite—at least with regards to nonremovable artworks on buildings—“it is satisfied here  
16 under familiar agency principles.” Docket No. 65 (“Ps’ Suppl. Br.”). Plaintiffs contend that  
17 Handsome Heidi acted as with “apparent authority” as an agent of CCI, or the CCI “ratified”  
18 Handsome Heidi’s consent to installation of the murals. *Id.* at 13-15.

19 Plaintiffs cite persuasive authority for the proposition that common law agency and  
20 ratification principles are recognized under VARA and/or the Copyright Act. *See, e.g., Carter v.*  
21 *Helmsley-Spear, Inc.*, 852 F. Supp. 228, 237 (S.D.N.Y. 1994) *rev’d in part and aff’d in part on*  
22 *other grounds*, *Carter*, 71 F.3d 77 (2d Cir. 1995) (“Finally, an owner or his *agent* may, at the time  
23 such a work is installed, seek from the artist or artists written consent to waive their VARA  
24 rights.”) (emphasis added); *Gilliam v. Am. Broad. Companies, Inc.*, 538 F.2d 14, 21 (2d Cir. 1976)  
25 (“Although the case of *Ilyin v. Avon Publications, Inc.*, 144 F.Supp. 368, 373 (S.D.N.Y.1956),  
26 may be broadly read for the proposition that a *holder of a derivative copyright may obtain rights*  
27 *in the underlying work through ratification*, the conduct necessary to that conclusion has yet to be  
28 demonstrated in this case.”) (emphasis added).

1       However, even assuming agency and ratification principles apply, Plaintiffs have not  
2 plausibly alleged that Handsome Heidi acted as an “apparent agent” of Defendant CCI, or that CCI  
3 “ratified” Handsome Heidi’s consent. To plead CCI’s liability on the basis of Handsome Heidi’s  
4 “apparent agency,” Plaintiffs would need to allege that Handsome Heidi manifested its role as  
5 agent of CCI, CCI engaged in conduct endowing Handsome Heidi with apparent authority, and  
6 that Plaintiffs reasonably relied on those manifestations before deciding to install the murals.

7 *Restatement (Third) of Agency* § 2.03 (2006). *See also id.* at § 2.03 cmt. c. (“Apparent authority  
8 holds a principal accountable for the results of third-party beliefs about an actor’s authority to act  
9 as an agent when the belief is reasonable and is traceable to a manifestation of the principal.”).  
10 The complaint, however, is devoid of any allegations as to Handsome Heidi’s manifestation of its  
11 role as an agent of CCI and CCI’s role therein.

12       Likewise, Plaintiffs have not plead facts sufficient to demonstrate CCI’s ratification of  
13 Handsome Heidi’s consent. “Ratification is the affirmance of a prior act done by another,  
14 whereby the act is given effect as if done by an agent acting with actual authority.” Restatement  
15 (Third) Of Agency § 4.01 (2006). A person ratifies an act by manifesting assent that the act shall  
16 affect the person’s legal relations, or by conduct that justifies a reasonable assumption that the  
17 person so consents. *See Id.* In the Ninth Circuit, agency through ratification presupposes an  
18 existing agency relationship. *See Batzel v. Smith*, 333 F.3d 1018, 1036 (9th Cir. 2008) (“a  
19 principal agent relationship is ... a requisite [to ratification], and ratification can have no meaning  
20 without it.”). The absence of allegations to establish the presupposition of an agency relationship  
21 between CCI and Handsome Heidi, Plaintiffs cannot establish their ratification theory. Nor is  
22 there any allegation as to CCI’s conduct in ratifying Handsome Heidi’s authority of the works.

23       Thus, the Court finds that Plaintiffs have failed to plausibly plead consent as required to  
24 state a claim under VARA for nonremovable works affixed to buildings. *See* 17 U.S.C. §  
25 113(d)(1).

26       3.       Removability

27       The question remains whether a consent requirement is implied in § 113(d)(2) regarding  
28 VARA’s protection of removable works of art. The Court concludes it does not.

1       Section § 113(d)(2) regarding removable works of art does not trigger the same concerns  
2 as § 113(d)(1) regarding nonremovable works. Section 113(d)(2)(A) and (B) requires only that a  
3 building owner make “a diligent, good faith attempt” to notify the artist of the impending removal  
4 of the removable work, or to provide 90 days of written notice to the artist before removing it. *Id.*  
5 While these notice requirements do burden building owners, the burden is minimal in comparison  
6 to the absolute bar on altering nonremovable artworks. And Section 113(d)(2) makes no reference  
7 to a need for a pre-existing agreement between the artist and the building owner, an agreement  
8 which presume knowledge by the building owner. Because building owners have reasonable  
9 recourse to address removable works on their property, no pre-existing agreement nor prior  
10 building owner knowledge and consent is required.

11       Thus, with regards to works affixed to buildings, Plaintiffs may state a claim under VARA  
12 *either* by alleging (1) that the work is nonremovable but was installed with permission of the  
13 building owner pursuant to § 113(d)(1), *or* (2) that that work is removable pursuant to § 113(d)(2).

14       Here, Plaintiffs argue that they have alleged enough to support an inference of  
15 removability based on the following allegation: “The owners of the Stud requested info from  
16 Defendants about their plans for the building, specifically noting that if the building was to be  
17 demolished that community members were interested in the facade being saved, preserved and  
18 moved; or that pieces of the building could be distributed.” Compl. ¶ 18. Although the allegation  
19 suggests that portions of the murals could be “saved, preserved or moved,” the allegation is set  
20 within the context of Defendant’s contemplated “demoli[tion]” of the building. Accordingly, it is  
21 not clear from the allegation whether or which (if any) murals are removable, as opposed to  
22 whether the preservation of the murals could only be achieved if they were salvaged from the  
23 building in the course of the demolition. Plaintiff further argues that the photographs of the  
24 murals, Compl. ¶ 15, demonstrate “that most of the pieces are on wood,” Ps’ Supl. Br. at 7. But  
25 that some of the works appear to be on wood does not necessarily mean that they are “removable.”

26       Thus, as plead, the complaint does not adequately allege that Plaintiffs’ artworks are  
27 removable and entitled to protection under § 113(d)(2).

1           4.       Willfulness

2           CCI further argues that Plaintiffs fail to state a claim under the VARA because they do not  
3           plausibly allege facts that CCI willfully or intentionally destroyed their artworks. Mot. at 17-18;  
4           *Scott*, 309 F.Supp.2d at 400 (a VARA claim requires plaintiff to prove (1) the mural is a “work of  
5           recognized stature” and (2) the defendant destroyed the mural in an intentional or grossly  
6           negligent manner). CCI, however, acknowledges the very sections in which Plaintiffs clearly and  
7           unambiguously state the factual bases for their allegations that CCI intentionally destroyed their  
8           murals. *Id.*

9           For example, Plaintiffs alleged that after announcing the closing of the Stud, the operators  
10          of the Stud, Handsome Heidi, requested information from Defendant CCI about its plans for the  
11          building, “specifically noting that if the building was to be demolished that community members  
12          were interested in the façade being saved, preserved and moved; or that pieces of the building  
13          could be distributed.” Compl. ¶ 18. Then, on June 20, 2020, in the middle of the Pride  
14          celebration, Plaintiffs alleged that CCI began to paint the building white, and then beige. *Id.* ¶ 20.  
15          Plaintiffs further allege that the “moment [CCI] began whitewashing and erasing the Artists’  
16          Murals, people on the street asked them to stop, but they refused.” *Id.* Plaintiffs clearly allege that  
17          CCI completed its destruction of the murals by “mid-week of Pride 2020,” and that CCI’s  
18          decision, without warning or notice, to willfully destroy the murals during a historic event for San  
19          Francisco’s LGBTQ community “demonstrated clear disdain for and degradation of [Plaintiffs]”  
20          and caused sadness, harm and outrage to Plaintiffs and the community. *Id.* ¶¶ 22-23.

21           Despite acknowledging these allegations, CCI contends that they are not enough to allege  
22          willfulness because Plaintiffs had not established that they possessed any property “rights in the  
23          murals” or that “Plaintiffs had an interest in preserving and/or removing the murals.” Mot. at 18.  
24          CCI provides no explanation for why Plaintiffs are required to establish a property right in the  
25          murals in order to allege willfulness. CCI does not develop this argument, cite to any law, or  
26          authority supporting its assertion. Moreover, the Court is not aware of any cases interpreting  
27          VARA to require a plaintiff to allege that the defendant had the specific intent to violate the  
28          plaintiff’s VARA rights. Nor does Defendant cite any such cases. By contrast, cases describing

1 the elements of VARA state that VARA requires an allegation that a defendant *intentionally*  
 2 *destroyed the artwork* – as Plaintiffs have alleged here. *See Whalen v. United Food & Com.*  
 3 *Workers Loc. 135*, No. 14-CV-3017 W BLM, 2015 WL 4659213, at \*3 (S.D. Cal. Aug. 5, 2015)  
 4 (“[T]here appear to be two formulations for stating a VARA cause of action. In *Martin v. City of*  
 5 *Indianapolis*, 982 F.Supp. 625, 637 (S.D. Ind. 1997), the district court instructed that to state a  
 6 VARA claim, the plaintiff must allege (1) he or she was the authors (2) of a work of visual art (3)  
 7 within the scope of VARA (4) that was of recognized stature, and (5) **which was intentionally**  
 8 **destroyed**. In *Scott v. Dixon*, 309 F.Supp.2d 395, 400 (E.D.N.Y. 2004), the district court stated  
 9 that a VARA claim required plaintiff to prove (1) the mural is a ‘work of recognized stature’ and  
 10 (2) **the defendant destroyed the mural in an intentional or grossly negligent manner.”**  
 11 (emphasis added). Thus, Plaintiffs have sufficiently alleged CCI acted intentionally.

12       5.     Leave to Amend

13       For the reasons stated above, the Court concludes that Plaintiffs have failed to state a claim  
 14 under VARA because they have not plausibly alleged either that they had the consent of the  
 15 building owner, Defendant CCI, to install their nonremovable artworks to CCI’s building, or that  
 16 the artworks were removable.<sup>1</sup> Thus, Plaintiffs’ VARA claim is dismissed pursuant to Fed. R.  
 17 Civ. 12(b)(6).

18       However, Plaintiffs are granted leave to amend. Plaintiffs contend that they can satisfy the  
 19 consent pleading requirement based on information gleaned through discovery. Additionally,  
 20 Plaintiffs allege that discovery has helped to clarify which murals were removable. *See Ps’ Suppl.*  
 21 *Br.* at 16-19. Thus, the Court declines to find that leave to amend would be futile. Moreover,

---

22  
 23 <sup>1</sup> CCI asserts a new argument in the conclusion of its VARA briefing, for which it provides no  
 24 support or development: “Lastly, Plaintiffs have not plead facts regarding how each of the  
 25 Plaintiffs’ honor or reputation has been injured.” Mot. at 18. But this is not an element of a claim  
 26 required at the pleading stage, nor does CCI provide any argument that it is. *Lew v. City of Los*  
*Angeles*, No. 20CV10948DDPLAX, 2021 WL 3912272, at \*6 (C.D. Cal. Aug. 31, 2021) (“The  
 27 VARA does not require a showing that the destruction of a work of visual art be prejudicial to an  
 28 artists’ honor or reputation. Rather, the VARA provides that ‘any intentional distortion,  
 mutilation, or modification of [a work of visual art] is a violation of that right’—the right to  
 prevent the destruction of a work of visual art that would be prejudicial to the artists’ reputation or  
 honor. 17 U.S.C. § 106A (emphasis added). In other words, by statute, the intentional destruction  
 of a work of visual art is by definition prejudicial to the artists’ honor or reputation.”); cf. *Martin*,  
 982 F.Supp. at 637; *Scott*, 309 F.Supp.2d at 400.

1 Plaintiffs have not previously amended their complaint. Thus, Plaintiffs are granted leave to  
2 amend.

3 **B. State Law Claims**

4 CCI argues that Plaintiffs' state law claims under the California Arts Preservation Act  
5 ("CAPA") and for negligence must be dismissed because they are preempted by the VARA (or,  
6 alternatively, because Plaintiffs fail to state claims).

7 **1. VARA's Preemption Clause**

8 The VARA contains preemption provisions, providing:

9 (1) [A]ll legal or equitable rights that are equivalent to any of the  
10 rights conferred by section 106A with respect to works of visual art  
11 to which the rights conferred by section 106A apply are governed  
12 exclusively by section 106A and section 113(d) and the provisions  
of this title relating to such sections. Thereafter, no person is  
entitled to any such right or equivalent right in any work of visual  
art under the common law or statutes of any State.

13 (2) Nothing in paragraph (1) annuls or limits any rights or remedies  
14 under the common law or statutes of any State with respect to—

15 (A) any cause of action from undertakings commenced before  
16 the effective date set forth in section 610(a) of the Visual Artists  
17 Rights Act of 1990;

18 (B) activities violating legal or equitable rights that are not  
19 equivalent to any of the rights conferred by section 106A with  
respect to works of visual art; or

20 (C) activities violating legal or equitable rights which extend  
beyond the life of the author.

21 17 U.S.C. § 301(f). Courts have acknowledged that "[f]rom the text and structure of the  
22 statute, Congress clearly intended pre-emption analysis under VARA to track that of copyright in  
23 general." *See Bd. of Managers of Soho Int'l Arts Condo. v. City of New York*, No. 01 CIV.1226  
24 DAB, 2003 WL 21403333, at \*12 (S.D.N.Y. June 17, 2003) (citing H.R.Rep. No. 101-514 at 21  
25 (1990) ("Section 5 [the preemption clause] of the bill follows the principles set forth in ... the  
26 preemption section of the Copyright Act"); Nimmer on Copyright § 8D.06[F][2] at 8D-93-94  
27 ("Construction of this [preemption] provision should presumably follow the general jurisprudence  
28 of copyright preemption")). "Indeed, not only did Congress place VARA's pre-emption clause  
within the copyright title's own pre-emption provision, but it also utilized nearly identical

language to describe the scope of VARA's pre-emptive reach." *Id.*<sup>2</sup> "Thus, copyright preemption analysis is determinative of the scope of VARA's preemption clause." *Id.*; *see also Lew v. City of Los Angeles*, No. 20CV10948DDPPLAX, 2021 WL 3912272, at \*6 (C.D. Cal. Aug. 31, 2021) (applying preemption analysis under the Copyright Act to VARA's preemption clause); *Whalen v. United Food & Com. Workers Loc. 135*, No. 14CV3017-WQH-BLM, 2016 WL 2866875, at \*2 (S.D. Cal. May 17, 2016) (same).

The Ninth Circuit uses a two-part test to determine whether a state-law claim is preempted by federal copyrights laws. *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1137 (9th Cir. 2006). The first part determines whether the work in question falls within the scope of the Copyright Act—that is, whether it is an "original" work "of authorship fixed in any tangible medium of expression." *Id.*; *see* 17 U.S.C § 102. The second part tests "whether the rights asserted under state law are equivalent to the rights contained" in the federal copyright law. *Laws*, 448 F.3d at 1138.

## 2. CAPA Claim

Plaintiffs do not dispute that the first part of the Ninth Circuit's preemption test for federal copyright laws is satisfied here. The parties focus on the second prong: whether the rights Plaintiff asserts under CAPA are equivalent to the rights contained in and protected by the VARA. With respect to the VARA, the Act confers "moral rights" of artists—the rights of "integrity" and "attribution." *Cort*, 311 F.3d at 985-86. The right of integrity allows the artist "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation...." 17 U.S.C. § 106A. Likewise, CAPA also protects the right of integrity as well as the artist's reputation. *See* Cal. Civ. Code § 987(a) ("The Legislature hereby finds and declares that the physical alteration or destruction of fine art, which is an expression of the artist's personality, is detrimental to the artist's reputation, and artists therefore have an interest

<sup>2</sup> Compare 17 U.S.C. § 301(a) (Copyright Act) ("Thereafter, no person is entitled to any such right [within the general scope of copyright] or equivalent right in any such work under the common law or statutes of any State.") with 17 U.S.C. § 301(f) (VARA) ("Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or any statutes of any State.").)

1 in protecting their works of fine art against any alteration or destruction; and that there is also a  
 2 public interest in preserving the integrity of cultural and artistic creations.”).

3 Here, Plaintiffs expressly assert that their claim under CAPA seeks to vindicate their  
 4 “rights of integrity in their work, as set forth in Cal. Civ. Code § 987.” Compl. ¶ 33. The right of  
 5 integrity Plaintiffs assert under CAPA appears to be equivalent, if not identical, as the right of  
 6 integrity contained in the VARA. Plaintiffs argue generally that “CAPA protects different  
 7 economic interests than VARA” and “affords different remedies and protects a different thicket of  
 8 rights than VARA.” Opp. at 18. The Court need not address these general propositions or decide  
 9 whether VARA *always* preempts a claim under CAPA.<sup>3</sup> That is because Plaintiffs fail to explain  
 10 how the right they assert under CAPA *here*—their right to integrity (and the protection of their  
 11 works)—differs in any way from the right to integrity protected by the VARA. *See* 17 U.S.C. §  
 12 301(f)(1) (VARA’s express preemption clause provides that “no person is entitled to any such  
 13 right or equivalent right in any work of visual art under the common law or statutes of any  
 14 State.”). The allegations here are like those in *Whalen v. United Food & Com. Workers Loc.*  
 15 135, where the court found plaintiffs’ CAPA claim preempted by VARA where the plaintiffs  
 16 alleged only that their rights to integrity were violated without distinguishing that right from the  
 17 one protected by VARA. 2016 WL 2866875, at \*3 (S.D. Cal. May 17, 2016).

18 Thus, “[b]ecause the right of integrity asserted in Plaintiffs’ CAPA claim falls within the  
 19 scope of VARA, the CAPA cause of action is preempted.” *Id.*; *see also Lew v. City of Los*  
 20 *Angeles*, No. 220CV10948DDPLA, 2022 WL 60592, at \*6 (C.D. Cal. Jan. 6, 2022) (“Plaintiff  
 21 alleges that Defendants have violated ‘his right of integrity.’ Because Plaintiff’s rights asserted  
 22 under his CAPA claims fall squarely within the scope of VARA, the second prong is satisfied.”).

---

23  
 24 <sup>3</sup> See e.g., *Close v. Sotheby's, Inc.*, 894 F.3d 1061, 1072 (9th Cir. 2018) (“In enacting VARA in  
 25 1990, the House of Representatives indicated that: ‘State artists’ rights laws that grant rights not  
 26 equivalent to those accorded under the proposed law are not preempted, even when they relate to  
 27 works covered by H.R. 2690. For example, the law will not preempt a cause of action for a  
 28 misattribution of a reproduction of a work of visual art or for a violation of a right to a resale  
 royalty.’” (citing H.R. Rep. No. 101-514, 1990 U.S.C.C.A.N. 6915, 6931 (1990)); *cf. Lubner v.*  
*City of Los Angeles*, 45 Cal. App. 4th 525, 531 (1996) (“[I]t appears that section 987 has been  
 preempted by the Visual Artists Rights Act of 1990. . . though it is not certain whether the  
 California statute and the federal legislation are equal in scope”).

1 Thus, Plaintiffs' CAPA claim, as plead, is preempted by the VARA.

2       3.     Negligence Claim

3             Similarly, CCI argues that Plaintiffs' negligence claim is preempted by the VARA. Mot.  
4 at 20. Plaintiffs' negligence claim is based on the following allegations:

5             Defendants, as custodians of the Murals, owed a duty of care to  
6 Plaintiffs to preserve the Murals and provide Plaintiffs the  
7 opportunity to remove the Murals from Defendants' property; at  
8 which point Plaintiffs would have been able to take title to their  
Murals free and clear of any adverse claims. . . Defendants  
destructive acts were the proximate cause Plaintiffs' injuries—the  
amount of which is to be proven at trial.

9 Compl. ¶¶ 37, 39. Plaintiffs' negligence claim seems to reframe the rights provided for by the  
10 VARA to preserve or be notified of the removal of their murals, *see* 17 U.S.C. § 106A(a), as a  
11 "duty of care" under state negligence law. Additionally, the injuries which Plaintiffs allege in the  
12 complaint, and to which they presumably refer in their negligence claim, are injuries to "Plaintiffs  
13 in their occupation. . . concerning the status of Plaintiffs as artist, and the status of their work," as  
14 well as "prejudice to Plaintiffs' honor and reputation." Compl. ¶¶ 23, 29. The interests protected  
15 by the "duty of care" alleged by Plaintiffs are no different than the "right of integrity" protected by  
16 the VARA. Indeed, Plaintiffs do not cite any common law duty of care that implies CCI's duty to  
17 "preserve the Murals and provide Plaintiffs the opportunity to remove the Murals from [CCI's]  
18 property." Instead, any such duty appears to arise directly from the rights protected by the VARA  
19 (and CAPA). Likewise, the injuries Plaintiffs allege are identical to the injuries Plaintiffs seek to  
20 remedy through their VARA claim.

21             Again, Plaintiffs argue only generally that their "state law negligence claim affords  
22 different rights—protecting as it does economic rights; Plaintiffs suggest that Paragraph 37 of the  
23 Complaint asserts the Artists' title in the physical art works which results in different damages for  
24 the harm to the Artists' reputation protected by VARA." Opp. at 19. But Plaintiffs' complaint  
25 does not actually assert their ownership or title rights to the murals. Paragraph 37 of the complaint  
26 alleges that *if* CCI had preserved the murals or provided Plaintiffs with the opportunities to  
27 remove the murals, *then* "Plaintiffs would have been able to take title to their Murals free and clear  
28 of any adverse claims." Compl. ¶ 37. It does not allege a preexisting ownership right in the

1 murals. Instead, their rights are based on VARA (and CAPA), not title ownership.

2 Plaintiffs are correct that *if* they were to have alleged an ownership right in the murals,  
3 *then* their negligence claim would not necessarily be preempted by the VARA. That is precisely  
4 what occurred in *Whalen*. There, the “[p]laintiffs allege[d] that they ‘did not relinquish their  
5 ownership or title rights to ‘Providing the Feast Mural’’” and further alleged that the defendant  
6 ‘intentionally deprived’ the plaintiffs “of their ownership or title rights by ‘desecrating ‘Providing  
7 the Feast Mural.’’” *Whalen v. United Food & Com. Workers Loc. 135*, No. 14CV3017-WQH-  
8 BLM, 2016 WL 2866875, at \*3 (S.D. Cal. May 17, 2016). The court reasoned that “[a]s alleged,  
9 Plaintiffs' property rights are distinct from the moral rights that VARA protects,” and, thus,  
10 “VARA does not preempt Plaintiffs' common law conversion and negligence claims which seek  
11 damages for the intentional deprivation of Plaintiffs' ‘ownership or title rights’ to the mural.” *Id.*

12 However, Plaintiffs here have not alleged similar facts to support a negligence theory to  
13 vindicate property rights in the murals. Instead, as plead, Plaintiffs' negligence claim seeks  
14 redress for violations of the same moral right of integrity protected by the VARA. Plaintiffs'  
15 negligence claim, then, is preempted by the VARA.

16 C. Leave to Amend

17 For the reasons explained above, Plaintiffs' state law CAPA and negligence claims are  
18 preempted by the VARA. However, VARA may not *always* preempts claims under CAPA and  
19 for negligence. Plaintiffs are in the midst of ongoing discovery (scheduled to close on June 13,  
20 2022, *see* Docket No. 54), which may reveal facts that support viable claims. Plaintiffs have not  
21 previously amended their complaint. In light of Fed. R. Civ. P. 15(a)(2) liberal policy favoring  
22 leave to amend “when justice so requires,” Plaintiffs are granted leave to amend their state law  
23 claims.

24 **IV. CONCLUSION**

25 The Court **GRANTS** CCI's motion to dismiss or for judgment on the pleadings as to  
26 Plaintiffs' VARA claim because Plaintiffs have failed to state a claim. The Court also **GRANTS**  
27 CCI's motion for judgment on the pleadings as to Plaintiffs' state law claims under CAPA and for  
28 negligence because those claims, as plead, are preempted. However, the Court grants Plaintiffs'

1 leave to amend their VARA and state law claims.

2 Plaintiffs' amended complaint is due within thirty (30) days of entry of this order.

3 This order disposes of Docket No. 51.

4

5 **IT IS SO ORDERED.**

6

7 Dated: July 11, 2022

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

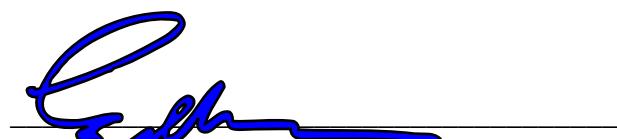
24

25

26

27

28



EDWARD M. CHEN  
United States District Judge